

ASHBY & GEDDES

ATTORNEYS AND COUNSELLORS AT LAW
500 DELAWARE AVENUE
P. O. BOX 1150
WILMINGTON, DELAWARE 19899

TELEPHONE
302-654-1888
FACSIMILE
302-654-2067

May 2, 2007

VIA ELECTRONIC FILING

The Honorable Mary Pat Thyng
United States District Court
844 North King Street
Wilmington, Delaware 19801

**REDACTED
PUBLIC VERSION**

Re: *Sepracor, Inc. v. Dey, L.P. and Dey, Inc.*
C.A. No. 06-CV-113-*** (MPT); (Consolidated)

Dear Judge Thyng:

We write in advance of the teleconference set for May 4, 2007 at 8:00 a.m. to request the Court to compel Sepracor, Inc. ("Sepracor") to produce: (1) e-mails from its backup media; and (2) letters written to former employees

SEPRACOR'S "FIRST CLASS" E-MAIL BACKUP MEDIA

First, Dey seeks a Court order compelling Sepracor to produce responsive non-privileged e-mails from the period 1995-1999 from Sepracor's backup media. The information sought is both highly relevant and limited in scope. As Dey currently understands it,

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However, as detailed below, the information about back-up media provided to Dey has changed over time.

Sepracor's first disclosure of its backup e-mail was made on October 3, 2006.

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REDACTED

In response to Dey's inquiries about Sepracor's backup media, :

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(Ex. D, at p. 4, emphasis added.) It is unclear from this exactly what backup media for the **REDACTED** system Sepracor actually has. Sepracor's April 27, 2007, letter further muddies the waters:

REDACTED

Moreover, as the transcript of the February 28 conference with the Court makes clear, Sepracor did agree to produce the **REDACTED** backup tapes:

MS. LEFF: . . . We've agreed that *the set of backup tapes from* **REDACTED** *which is identified at page three* and any logs of those tapes, if possible, *will be produced* within two-to-three weeks.

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THE COURT: All right. So far, are you in agreement, Bill, concerning this?

MR. DAVIS: *Yes, Your Honor.*

(Ex. B, at p. 14, emphasis added.)

SEPRACOR repeatedly states that the **REDACTED** backup media is of "limited accessibility" and argues that these e-mails will contain little of relevance:

The expense and time that would be involved in retrieving information from Sepracor's outdated backup media cannot be justified because, *inter alia*, the files on that backup media are not likely to yield any relevant information from the periods of time relevant to any claim or defense in this case. Under these circumstances, there is no basis to require Sepracor to produce backup media.

(Ex. D, at 3.) It is unclear why Sepracor believes the email backups "are not likely to yield any relevant information from the periods of time relevant to any claim or defense in this case." The period of time in question, 1995-1999, is highly relevant to the claims and defenses in this case. The first patent-in-suit did not issue until November 1994. The remaining four patents issued after 1995 and were therefore being examined in the patent office during the period in question.

Sepracor's concerns about the burden and cost to extract, review, and produce this "limited-accessibility" information presume that native file restoration is the only way to obtain the data. It is not. Non-native file restoration exists, and Dey understands that it is typically much less expensive and burdensome. Dey requests this Court to order production of the backup e-mails.

PRODUCTION OF UNPRIVILEGED DOCUMENTS

Sepracor has asserted attorney-client privilege for its communications with James Young and other former employees. This assertion is unsupported by the law of this circuit. Third Circuit case law holds that attorney client privilege only extends to privileged communications with former employees that occurred "*during* the employment relationship." *U.S. v. Merck-Medco*, 340 F.Supp. 2d 554, 557 (E.D. Pa. 2004) (emphasis added), citing *Infosystems v. Ceridian*, 197 F.R.D. 303 (E.D. Mich. 2000); *see also U.S. v. Merck-Medco*, 2004 U.S. Dist. Lexis 23431, at *8 (Nov. 15, 2004). This limitation of attorney-client privilege comports with the long-standing policy of narrowly construing the attorney-client privilege in the Third Circuit. As recently as 2006, district courts in the Third Circuit have reiterated that because "the [attorney-client] privilege obstructs the search for the truth and because its benefits are, at best indirect and speculative, it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (quoting 8 *Wigmore on Evidence* § 2291, at 545 (1961)); *see Gilliland v. Geramita*, 2006 U.S. Dist. LEXIS 65546, *5 (W.D. Pa. 2006).

Accordingly, Dey respectfully requests that this Court order Sepracor to produce any and all communications with former employees that did not occur during the period of employment.

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Respectfully,

/s/ John G. Day

John G. Day (I.D. #2403)

JGD: nml
180157.1

cc: Richard D. Kirk, Esquire (via electronic mail)
Elizabeth A. Leff, Esquire (via electronic mail)
Jack M. Stover, Esquire (via electronic mail)
Todd R. Walters, Esquire (via electronic mail)

EXHIBIT A

REDACTED

EXHIBIT B

06-610¹

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

SEPRACOR, INC.,

Plaintiff,

v

DEY, L.P. and DEY, INC.,

Defendants.

- - -
: CIVIL ACTION
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: NO. 06-113 (***)

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Wilmington, Delaware
Wednesday, February 28, 2007 at 3:02 p.m.
TELEPHONE CONFERENCE

- - -
BEFORE: HONORABLE **MARY PAT THYNGE**, U.S. MAGISTRATE JUDGE

- - -
APPEARANCES:

THE BAYARD FIRM
BY: RICHARD D. KIRK, ESQ.

and

BUCHANAN INGERSOLL & ROONEY, PC
BY: WILLIAM E. DAVIS, ESQ.
(Miami, Florida)

and

BUCHANAN INGERSOLL & ROONEY, PC
BY: SUSAN M. DADIO, ESQ., and
BARBARA WEBB WALKER, Ph.D., ESQ.
(Alexandria, Virginia)

and

Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES: (Continued)

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BUCHANAN INGERSOLL & ROONEY, PC
BY: JAYSON R. WOLFGANG, ESQ.
(Harrisburg, Pennsylvania)

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Counsel for Plaintiff

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ASHBY & GEDDES
BY: JOHN G. DAY, ESQ.

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and

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FROMMER LAWRENCE & HAUG L.L.P.
BY: JOHN S. GOETZ, ESQ.
(New York, New York)

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and

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FROMMER LAWRENCE & HAUG L.L.P.
BY: ELIZABETH A. LEFF, ESQ.
(Washington, District of Columbia)

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Counsel for Defendants

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P R O C E E D I N G S

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(REPORTER'S NOTE: The following telephone

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conference was held in chambers, beginning at 3:02 p.m.)

1 I'll be very pleased.

2 MS. LEFF: Okay.

3 THE COURT: Go ahead.

4 MS. LEFF: Here goes.

5 We have been informed there are no backup tapes
6 from between 1989 to 1995.

7 In November 2002, the system was backed up and
8 there are between 100 to 116 backup tapes that were made.
9 There were also one set of the last backup tapes from the
10 first class e-mail system.

11 Between 1995, there was a litigation hold put
12 on in September-October '05. That the backup tapes were
13 destroyed every 30 days pursuant to their policy. There
14 are currently approximately 2,000 backup tapes from
15 September-October '05 to the present. So what we've agreed
16 to at this point is that we would like to obtain the logs
17 for the 100 to the 116 backup tapes from November 2, 2002 to
18 determine if and which tapes we might want. They estimate,
19 Sepracor's counsel estimates it will take them two-to-three
20 weeks to obtain the log and so we will wait for those. And
21 that includes the log on the first class e-mail.

22 THE COURT: Okay.

23 MS. LEFF: We're also asking Sepracor to pull
24 the tapes from the 100 to 116 backup tapes now so we don't
25 have to wait an additional two-to-three weeks if we want to

1 inspect them.

2 We've agreed that the set of backup tapes from
3 first class which is identified at page three and any logs
4 of those tapes, if possible, will be produced within
5 two-to-three weeks.

6 THE COURT: As I to understand, Elizabeth, on
7 the first tape issue, the 100 to the 116, that Sepracor has
8 agreed to pull the tapes now?

9 MS. LEFF: Yes.

10 THE COURT: Okay.

11 MS. LEFF: But we are not going to inspect them
12 right away.

13 THE COURT: I understand that. I understand.

14 MS. LEFF: Okay. And then, finally, they
15 reserve the right to obtain the logs for and to inspect the
16 2,000 plus backup tapes which have been retained since
17 September to October '05 because of the litigation hold. We
18 are not going to inspect either the logs or the tapes now
19 but we reserve our right to do so later in the litigation,
20 if necessary.

21 THE COURT: All right. So far, are you in
22 agreement, Bill, concerning this?

23 MR. DAVIS: Yes, Your Honor. I just would
24 like to point out, and I have explained it to counsel, using
25 of the term "log," what that will include is a document

1 which reflects the date range of the tapes and probably a
2 description of the systems which were backed up on the
3 tapes. I don't want to suggest that there is any more
4 information than that at this point and the agreement is to
5 look at them and see where we are.

6 THE COURT: All right. And you're in agreement
7 with that understanding, Elizabeth?

8 MS. LEFF: Yes, I am, Your Honor.

9 THE COURT: All right.

10 MR. DAVIS: There was one other matter, Your
11 Honor, that we had raised but counsel for Dey has agreed
12 to provide us with a definitive response to our various
13 correspondence regarding discovery issues by March the 9th.

14 THE COURT: All right. I think that dealt with
15 your letter of -- let me double-check.

16 MR. DAVIS: There was a letter of February 22nd,
17 which was the follow-up letter to a number of letters, but
18 counsel has agreed with us that they will provide us a
19 definitive response to the issues we've raised in those
20 letters.

21 THE COURT: And those various letters are
22 Exhibits A through D?

23 MR. DAVIS: That is correct, Your Honor.

24 THE COURT: All right. Fine. Is there anything
25 else, counsel, that we need to discuss or put on the record

EXHIBIT C

REDACTED

EXHIBIT D

REDACTED

EXHIBIT E

REDACTED